United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

839

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,922

UNITED STATES OF AMERICA

Appellee,

vs.

RONALD STEVENSON

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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(Appointed by this Court)

April 28, 1970

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AUTHORITIES

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dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack knife, billy, metallic or other false knuckles, then, notwithstanding any other provision of law, the court shall not suspend his sentence or give him a probationary sentence. 27

APPENDIX B: 22 D.C. Code, Section 2901. Robbery.

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than [six months] nor more than fifteen years. 27

APPENDIX C: 22 D.C. Code, Section 502. Assault with intent to commit mayhem or with dangerous weapon.

Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years. 27

APPENDIX D: 22 D.C. Code, Section 3204. Carrying concealed weapons.

No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years. 27

ISSUES PRESENTED*

I Was appellant denied the effective assistance of counsel required by the Sixth Amendment to the United States constitution and United States v. Wade at a lineup due to the inadequate information provided counsel by the government?

II Does the showing of photographs to witnesses who were to view a lineup previously ordered deny the effective assistance of counsel at the lineup or create an unnecessary risk of misidentification within the meaning of Simmons v. United States, where the witness is to be brought to the lineup whether or not he identified the suspect.

III Where there is a lineup identification by the victim of a simple witness robbery, does the delay of in providing notice to appellant that he is to be charged, where he is already in penal custody, violate the rule of Ross, Godfrey-Jones where appellant is entirely unable at trial to reconstruct his activities during the time period of the robbery.

IV Where the only evidence that a gun was used in a robbery is that the item in the robber's hand looked like a gun to the frightened victim who saw no bullet in the chamber, was it error to deny two motions for judgment of acquittal of Armed Robbery, Assault with a Deadly Weapon, and carrying a Dangerous Weapon, as well as to deny appellant's motion for judgment of acquittal notwithstanding the verdict?

* This case has not previously been before this Court.

REFERENCES TO RULINGS

I

On November 5, 1969 Judge June L. Green of the United States District Court ruled that evidence of a February 11, 1969 lineup in which Romie Jones identified Appellant would not be suppressed, nor the in-court identification for that reason.(Tr.75).

II

On November 6, 1969 Judge June L. Green ruled that evidence of a photographic identification of Appellant on February 5, 1969 by Romie Jones would not be suppressed, nor the in-court identification. (Tr. 154,157,158).

III

On November 6, 1969 Judge June L. Green overruled appellant's continuing objection to identification testimony by Romie Jones. (Tr. 158).

IV

On November 6, 1969 Judge June L. Green ruled that the delay in notifying appellant of the charges did not require dismissal of the indictment. (Tr. 166-67).

V

On November 7, 1969 Judge June L. Green denied appellant's

motion for judgment of acquittal after the government's case (Tr. 321).

VI

On November 7, 1969 Judge June L. Green denied appellant's motion for judgement of acquittal at the close of the evidence (Tr. 397).

VII

On November 7, 1969 Judge June L. Green denied appellant's motion for judgement of acquittal notwithstanding the verdict. (Tr. 449-50).

STATEMENT OF THE CASE

Appellant was found guilty by a jury on November 7, 1969 of Armed Robbery (22 D.C. Code §3202), Assault with a Dangerous weapon (22 D.C. Code §502) and Carrying a Dangerous weapon (22 D.C. Code §3204) in the United States District Court for the District of Columbia. He was sentenced on December 30, 1969 to ten years under the Youth Corrections Act (18 U.S.C. §5010), and motive of appeal was filed January 2, 1970. The conviction arose out of the robbery of the night manager of a gas station on January 22, 1969 for which a four count indictment was returned against appellant on April 10, 1969 in which the charge of Robbery (22 D.C. Code §2901) was included with the three of which he was convicted.

The Government's Case

The evidence in the government's case showed that Romie Jones, the night manager of an Amoco station at 1201 Bladensburg road, had arrived at work at midnight on January 21, 1969. During his

first hour of work, while servicing a car, he observed two men walk through the driveway of the station, one of whom was wearing an Army fatigue jacket (Tr. 203). Later, at around 4:20 P.M. on January 22, 1970, Mr. Jones was walking into the bathroom of the station (Tr. 198) when he felt someone push something into his back. Thinking that the person behind him was a fellow employee, he said "Charles, do you want change for a five?" The response received was, "no, this is it." The voice then told Mr. Jones to keep walking into the bathroom, then, when he got inside, to turn around. (Tr. 199).

When he turned, "I seen a gun pointed in my stomach." He described the gun's length, and said it was a brown revolver, but he did not know whether there were any bullets in the chamber. (Tr. 200).

The person holding the supposed gun was wearing a green army fatigue jacket with the hood drawn so that only his eyes, mouth, nose and a portion of his chin showed. He was also wearing khaki pants, and had no mustache (Tr. 200-201). He searched Mr. Jones, who had his hands in the air, taking about $83 in receipts from the station (Tr. 201-202).

Upon completing the search, estimated by Mr. Jones as of two minutes duration, the robber told Mr. Jones to go into the rest room stall. (Tr. 202). When he complied the robber backed out the rest room door. Mr. Jones testified the robber was the same man he had seen walking through the station earlier in the evening (Tr. 203), and that he had seen him many times prior to that night (Tr. 204). His previous observations occurred when the man came

into the station to use the vending machines. (Tr. 204).

Three other people were in another part of the station during the robbery. (Tr. 204). Mr. Jones waited a few moments, then went and told them to call the police, he had been robbed (Tr. 205). He gave the police a general description (Tr.205-206).

Mr. Jones identified Appellant in court as the robber (Tr. 206), and then told of a photographic identification of Appellant previously made (Tr. 207). This occurred shortly before a lineup (Tr. 207), held February 11, 1969, at which he also identified appellant (Tr. 208-209). The witness described the robber and appellant as having the common characteristic of holding their head to one side when they walked. (Tr. 210).

On cross-examination, Mr. Jones admitted that when the robber told him to go into the stall after obtaining the money, he s said "If you turn around I will shoot you," yet insisted that he nonetheless looked over the top of the stall and observed the robber backing out the door. He indicated that the oval of the robber's face which he could see extended from below the hairline to slightly below his lips. (Tr. 218-19). It was also pointed out that in prior testimony the same witness indicated he had not turned around after going in the stall, since the robber had threatened to shoot him if he did. (Tr. 228-231). It was also said that Mr. Jones did not tell anybody that he had previously known the robber until after he identified a picture of Appellant on February 5, 1969 (Tr. 233,256).

It was also admitted that at the time of the photographic identification, only two photographs were viewed by the witness, since the second photo in the stock of eleven was Appellant's.

On Redirect the government brought out that the witness had seen the photo on only two prior occasions -- once when the officer brought it so the gas station, and once in the office of the prosecutor on October 22, 1969.

Officer Brady testified to the photographic identification (Tr. 255-57) and the lineup identification (Tr. 257). He also testified that the first time Mr. Jones had told him he had seen the man before was after the case went to the Grand Jury (Tr.258). This was later than the lineup date as well as the date of the photographic identification (Tr. 259).

Two other witnesses testified they had seen appellant some seven hours after the robbery. One of the two said he was wearing khaki pants and a green 3/4 length jacket (Tr. 265) while the other said he was wearing a brown jacket and tan pants (Tr. 304). The latter said he was clean-shaven at that hour.

The parties stipulated that appellant had no license to carry a pistol on his person in the District of Columbia (Tr.314).

The Defense Case

Loretta Thomas, Appellant's girlfried testified she had dated him steadily for nearly four years. Since she lived near the Amaco gas station, she often sent Mr. Stevenson there to get cigarettes or snacks from the vending machines (Tr. 323-24). In

November, 1968 Appellant's clothes had all been destroyed in a fire (Tr. 325). Miss Thomas never saw an Army fatigue jacket among his clothing, nor has she seen him wearing such an item of apparel. (Tr. 325).

Appellant testified that he did not recall his whereabouts at the time of the robbery. He was first notified in April, 1969 that he had been indicted for this robbery, and since that time has been unable to reconstruct the events of that day. The latest he recalled being out during January, 1969 was 3:00 A.M. or New Year's Eve. (Tr. 329-330).

On cross-examination he confirmed that the fire had destroyed all of his clothing, and that he moved to 18th Street after the fire. He nearly always left by midnight after almost daily visits with Miss Thomas, who lived with her parents. When he left, he normally would go home if it was late, if it was early, he often went to visit other friends. (Tr. 337). When he was with Mr. Jenkins the morning after the robbery at a nearby store, he was wearing a brown suade jacket and khaki pants. (Tr. 338). He said the previous night, a Tuesday, he probably would have visited Miss Thomas, since he did so four or five times a week, though he couldn't say whether he did so on that particular night (Tr.342) He had not been awake very long before going out the next morning to Hechingers, but he normally slept about eight hours each night (Tr. 342-43).

As to his appearance, appellant testified he shaved his

Mustache in February for the first time since high school (Tr.350-5), and he wears a goatee "off and on." (Tr. 351).

Detective McEwen testified Mr. Jones had previously told him that he was coming out of the bathroom when the robber entered (Tr. 358), and was robbed in the office area outside the bathtoom. (Tr. 359), and described the robber as wearing an Army fatigue jacket and pants (Tr. 359).

Officer McKinney, the first officer to respond to the robbery call (Tr. 367) testified Mr. Jones' pants were wet in the front, and that he had told the officer that "through the excitement he had wet his pants" (Tr. 368) and that the perpetrator was "wearing Army fatigue jacket and pants," (Tr. 369). This description was broadcast to all units. (Tr. 371).

John C. Youngs testified that Mr. Jones had stated that he saw the robber 35 minutes before the robbery when he asked for change for a dollar. (Tr. 379). He was in the rest room standing in front of a urinal when some one entered the bathroom and placed in his back, whereupon he wet his pants. (Tr. 380).

David C. Niblach testified that he was, appointed to represent Appellant in the Court of General Sessions on January 23, 1969 on a charge of shoplifting. (Tr. 392-93). He was not wearing an Army field jacket at that time, and had a mustache and a goatee (Tr. 393-94). The beard seemed full grown, and was more than a 24 or 48 hour growth. (Tr. 396).

Closing arguments of the defense was based upon a theory of misidentification (Tr. 408-423).

ARGUMENT

I

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL REQUIRED BY THE SIXTH AMENDMENT AT HIS LINEUP DUE TO THE INADEQUATE INFORMATION PROVIDED COUNSEL BY THE GOVERNMENT

A. Facts

Appellant's pretrial motion to suppress the lineup identification was based upon the failure of the U.S. Attorney's office and the police to provide to counsel the minimal information essential to effective assistance of counsel. Evidence was taken at the hearing, and the motion was denied.

Appellant had been appointed an attorney, Charles Murray, at his arraignment on February 4, 1969 on a charge of robbery of the Miles Long Sandwich Shop (Tr.12). At that arraignment a mimeograph lineup order (Tr.68) was signed, ordering appellant to appear at a lineup on February 11, 1969 (Tr.18). The judge signing the order refused to indicate whether witnesses would be present at the lineup other than those for the sandwich shop robbery (Tr.65). No notice that other witnesses would appear occurred until the lineup began (Tr. 18-22, 28,60-62).

Counsel had obtained the descriptions given by the witness

to the Miles Long robbery from the warrant and was satisfied that, as to that crime, appellant's lineup attire did not implicate him. He was also satisfied he did not stand out in the line compared to the others (Tr.52).

The conduct of the lineup was detailed by Mr. Murray (Tr. 12-75). This testimony indicates that, after preliminary matters, each attorney is called forward as the witnesses who are expected to identify his client begin entering the room. The policeman running the lineup readsthe lineup number, present time, date and place of offense, and asks the witness whether he or she can "identify anyone." (Tr. 28,55-56).

The attorney may be able to get the name of the witness by peeking over the policeman's shoulder at his paper, but the name is not given (Tr.28-56). Neither is any description previously given by that witness, nor any of the circumstances surrounding the alleged offense provided counsel prior to, at the lineup (Tr.34), or thereafter until, in this case, an indictment was returned (Tr.329).

When the first witness came in after Mr. Murray had been called forward, he noticed that the address read was not that of

the Miles Long Sandwich shop (Tr.60,34-36). From that time (9:32 p.m.) until 16 minutes later (9:48) eleven witnesses viewed the lineup (Tr.30-33). The same procedure is followed with each witness, and "you try to write as fast as you can the information given (Tr.29)." The information missing is often as important as that obtained (Tr.30-33). Often everything said can't be heard (Tr.57). Nothing was given counsel after the lineup which might fill in the gaps in his notes, though the police have their version of the lineup proceeding on a "lineup sheet." (Tr.57-59).

Since counsel knew of no other offenses, he asked for no information concerning them prior to the lineup (Tr.64). Even if he had known, no information is provided, as a matter of policy (Tr.65).

On the above facts, the motion to suppress the lineup identification was denied by the trial judge (Tr.75), and was introduced at trial (Tr.207-209).

B. Wade - Gilbert violated

The cases of United States v. Wade [1] and Gilbert v. California [2]

1/ 388 U.S. 218 (1967)
2/ 388 U.S. 263 (1967)

clearly established the right to counsel at a lineup. The exact scope of that right has never been squarely decided in this Circuit, or by the Supreme Court. This case presents an opportunity for clarification of that issue.

In United States v. Wade[3] itself, the Court established that the right to counsel was necessary, since "the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself."[4] The Court cited approvingly a model lineup procedure.[5] The model required, inter alia, that a description of the suspect should be given by the witness before he views any arrested person. This description should be available in order to allow counsel to avoid suggestiveness in the lineup before it occurs.

Two cases in the District of Columbia Circuit have agreed with this procedure. In both, extraordinary relief was sought, and deemed inappropriate. In both, the court noted that descriptions previously given by witnesses should be made available to

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3/ 388 U.S. 218 (1967)
4/ Id. at 235
5/ Id. at 236, n.26

counsel.

The first of these cases was Allen v. United States.[6] The Court there said that where there were to be witnesses to other crimes than those charged, counsel should be given, in advance of the lineup, the names of the witnesses who will attend, the time, place and nature of the crimes involved, and the previous descriptions these witnesses have given the police. The court also urged that counsel have a role in setting up the lineup to avoid suggestive features. The court also said the failure to comply with these requirements is to be raised by a motion to suppress, as was done here. The Allen case was decided on January 30, 1969, nearly two weeks prior to the lineup in the present case.

In the case of Spriggs v. Wilson,[7] decided after the lineup in this case, but prior to the motion to suppress, the court again declined preliminary relief for the government's failure to provide descriptions prior to the lineup. In so doing, the court

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6/ 133 U.S. App. D.C. 84, 408 F.2d 1287 (1969)

7/ ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 23,548, dec. Oct. 16, 1969)

noted that

> we see no reason, and the Government at oral argument has offered none beyond an unsubstantiated reference to convenience, why the right to effective assistance of counsel does not require that the description of the suspect as given to the police be made available to counsel for the appellant at the lineup.

The practice of the U.S. Attorney's office and the Metropolitan Police Department of conducting lineups without providing a list of witnesses to be present nor the prior descriptions given by those witnesses reduces counsel's role to that of a poor stenographer (Tr.57-59). This is because it is impossible for counsel to intelligently exercise the prerogative[8/] to suggest changes in the lineup (Tr.50-52) without such prior information. Consequently, the role for which Wade established the right to counsel is made impossible of fulfillment due to counsel's inadequate information.

No reason is seen for objection by the government to providing this information to counsel. To the contrary,

> law enforcement may be assisted by preventing the

8/ Allen v. United States, 133 U.S. App. D.C. 84, 408 F.2d 1287 (1969); Mason v. United States, ___ U.S. App. D.C. ___ F.2d (1969).

> infiltration of taint in the prosecution's identification evidence. That result cannot help the guilty avoid conviction, but can only help assure that the right man has been brought to justice. 9/

Due to the inadequate information provided counsel, the right to counsel was violated. The Gilbert per se exclusionary rule requires reversal for that reason, since the lineup identification was itself introduced into evidence. 10/

II

THE SHOWING OF PHOTOGRAPHS TO WITNESSES, WHO ARE TO LATER VIEW A LINEUP PREVIOUSLY ORDERED, WHETHER OR NOT A PHOTO OF APPELLANT IS IDENTIFIED, DENIES THE EFFECTIVE ASSISTANCE OF COUNSEL AT LINEUP AND CREATES AN UNNECESSARY RISK OF MISIDENTIFICATION WITHIN THE MEANING OF SIMMONS V. UNITED STATES

A. Facts

Appellant's pretrial motion to suppress identification testimony focused also upon the use of photographs. Officer

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9/ United States v. Wade, 388 U.S. 218, 238 (1967).
10/ Gilbert v. California, 388 U.S. 263, 273, ___ (1967); Clemmons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968). See also opinion of Black, J. in United States v. Wade, 388 U.S. 218, 247 (1967).

Brady, who was aware a lineup was to be held at which a number of witnesses were to view appellant (Tr.82), nonetheless took a group of eleven photographs to those witnesses to view several days prior to the lineup (Tr.82-87). Whether the witnesses identified appellant from the photos or not, they were brought to the lineup (Tr.92-93). The officer didn't remember the order in which the pictures were shown to Mr. Jones (Tr.92), though Mr. Jones remembers that appellant's photo was the second in the stack, (Tr.137-141). It is unclear which of the other ten photos was first. After Mr. Jones reached the second photograph, he didn't look through the remainder (Tr.141-42).

B. Right to Counsel

The right to counsel at lineup was provided to aid in the

> "prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself." 11/

This means that identifications before the lineup should only be engendered by the police in certain situations. These have been delineated by this court on prior occasions. They include the

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11/ United States v. Wade, 388 U.S. 218, 235 (1967).

return of one apprehended immediately after a reported crime to the victim for confirmation [12] and the use of a photographic spread in exigent circumstances in order to narrow the list of suspects. [13] Other legitimate reasons for pre-lineup identifications exist, as where no crime is suspected and an investigation remains general. [14]

Unless some necessity compels a showing of photographs prior to a lineup, no reason except the planting of an image in the mind of the witness which remains at the lineup can be offered for such a practice. Counsel's role at the lineup is reduced to mere presence. An analogous point was made in United States v. Wade, [15] where the court said

> Insofar as the accused's identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is de-

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12/ Russell v. United States, 133 U.S. App. D.C. 77, 408 F.2d 1280 (1969); Solomon v. United States, 133 U.S. App. D.C. 103, 408 F.2d 1306 (1969); Wise v. United States, 127 U.S. App. D.C. 279, 383 F.2d 206 (1967).

13/ United States v. Hamilton, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 22,361), dec. July 24, 1969). Cf. Simmons v. United States.

14/ United States v. Davis, 399 F.2d 948 (2d Cir. 1968). See also United States v. Kirby, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 23,106, dec. April 24, 1970).

> prived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. 16/

For the same reasons, Miranda warnings are required. It is an act of futility to require counsel at a lineup order to remove suggestive influences, if the image of the suspect can be freely planted prior to the lineup. No right to effective assistance of counsel at lineup exists unless a rule of necessity is created around the use of photographs. 16.5/

C. The Simmons Requirement of Necessity

Appellant was in custody under high money bond after his arraignment on the Miles Long Robbery on February 4, 1969. There was no fear on the part of the police that he might flee the jurisdiction if he were not apprehended. Nor was there any apparent suspicion that someone else committed the robbery here in question.

When officer Brady went to show Mr. Jones the eleven pictures, he was aware that a lineup had been ordered, and that Mr. Jones would be asked to attend. The witnesses to whom the photographs were shown were asked to attend whether or not they identified appellant's photo, as the government stipulated (Tr.94).

16/ Id at 235.

16.5/ See United States v. Kirby, (No.23,106, dec. April 24, 1970) Slip opinion at 3 for the non-custodial rule.

For these reasons, this case is a far cry from Simmons v. United States.[17] The Court there upheld the use of the photographic display, noting that"each case must be considered on its own facts."[18] In considering the case there presented, the court said

> In the first place, it is not suggested that it was unnecessary for the FBI to resort to photographic identification in this instance. A serious felony had been committed. The perpetrators were still at large. The inconclusive clues which law enforcement officials possessed led to Andrews and Simmons. It was essential for the FBI agents swiftly to determine whether they were on the right track, so that they could properly deploy their forces in Chicago and, if necessary, alert officials in other cities. The justification for this method of procedure was hardly less compelling than that which we found to justify the "one man lineup" in Stovall v. Denno.[18.5]

The Court upheld an in-court identification preceded by a photographic identification under those circumstances.

In the present case, the photographic identification was itself introduced (Tr.207-208), though the investigative necessity for using the photographs was nonexistant. As the Court

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17/ 390 U.S. 377 (1968).
18/ Id. at 384.
18.5/ Id. at 384-85.

noted in Simmons, the reliability of the identification procedure is considerably enhanced when no photographs are viewed prior to the "normally more accurate" lineup identification.[19] The cross-corroboration of the identification by five eyewitnesses in Simmons is absent here. Finally, the fact that appellant's picture was second in the stack when shown had the effect in fact of presenting only two photographs to Mr. Jones to view (Tr.137, 141), and it cannot be ascertained which of ten other photos was the first one he viewed.

In the Clemons v. United States[20] opinion, the court upheld the District Court ruling that a cellblock confrontation was unnecessarily suggestive:

> In reaching this result, the court, although professedly unable to perceive that any "affirmative suggestive influences" had been brought to bear, was at a loss to understand why a lineup was not held, since Clark was already in custody and, indeed, in the lineup area. In view of these latter facts, said the court, "Det. Hannon should have been able to delay the confrontation in order to fashion a better test of the witness' ability to identify defendant." [I]n the court's view, a jury inevitably regards evidence of a prior

19/ Id. at 386, n.6.
20/ 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968).

identification as probative of guilt.[21]

The same rule was applied later in the same opinion to another case under quite similar circumstances.[22] The distinction in time is highlighted in that case by the court's comparison of various witnesses to the same robbery:

> One of these three, within minutes after the robbery (as contrasted with the more than two months intervening before the cellblock viewing), picked Clemons' picture out of a collection of photographs, and the others concurred in that choice. [23]

Citations of these holdings[24] simply bolsters appellant's contention that the Simmons test of unnecessary suggestibility is violated here. Not only was the lone witness to a robbery shown only two photos, in effect, the first of which cannot be compared with appellant's, but this showing was unnecessary, since the witness was due to attend a lineup six days later. Whether or not the witness identified appellant, who was already

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21/ Id. at 42-43, 408 F.2d 1245-46.
22/ Id. at 46-47, 408 F.2d 1249-50.
23/ Id. at 47, 408 F.2d at 1250.
24/ To the same effect, see United States v. Hamilton, ___ U.S. App. D.C. ___, ___ F.2d___ (No. 22,361, dec. July 24, 1969); Hawkins v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___, (No. 21,997, dec. July 9, 1969).

in custody, he would attend the lineup. This procedure requires reversal.

III

THE THREE MONTH DELAY IN PROVIDING NOTICE TO APPELLANT THAT HE IS TO BE CHARGED, WHERE A LINEUP IDENTIFICATION OCCURS 20 DAYS AFTER THE SINGLE-WITNESS ROBBERY, AND APPELLANT IS ALREADY IN PENAL CUSTODY VIOLATES THE RULE OF THE ROSS, GODFREY AND JONES CASES WHERE APPELLANT IS ENTIRELY UNABLE AT TRIAL TO RECONSTRUCT HIS ACTIVITIES DURING THE TIME PERIOD SURROUNDING THE ROBBERY.

Appellant's motion to dismiss the indictment on Ross-Godfrey-Jones grounds was made prior to trial, (Tr.159-167) and denied (Tr.167).

In the case of Ross v. United States,[25/] the seven month delay attributable to the police practice of using undercover agents was held too long. Due to the prejudice resulting from an inability to reconstruct the day of the alleged narcotics offense, the court reversed. An additional factor in Ross was the

25/ 121 U.S. App. D.C. 233, 238 F.2d 259 (1956).

"trial in which the case against appellant consists of the recollection of one witness refreshed by a notebook."[26]

In Jones v. United States,[27] the court remanded for a hearing on the prejudicial effect of a seven month delay between offense and arrest. The reason for the delay was apparently confusion of police authorities over jurisdiction, though there were unsuccessful efforts to reach Jones.

There were also efforts made to locate the defendant in Godfrey v. United States.[28] In that case the two month undercover delay was added to the delay in arresting the appellant. The latter delay was found to be fatal to the conviction, since the appellant's memory of the day in question failed.

The basis for the results reached in these three cases was nominally delay in arrest. In fact, each case points out that this delay results in the failure to give notice to an accused that he is to be charged with the offense. This rule derives as Ross[29] makes clear, from the statement in Nickens v. United States

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26/ Id. at 238.
27/ 131 U.S. App. D.C. 88, 402 F.2d 639 (1968).
28/ 123 U.S. App. D.C. 219, 358 F.2d 850 (1966).
29/ 116 U.S. App. D.C. 338, 323 F.2d 808 (1963).

that

> "Due process may be denied when a formal charge is delayed for an unreasonably oppressive and unjustifiable time after the offense to the prejudice of the accused." 30/

Where the prejudice asserted is an inability to reconstruct the events of the time in question the failure to provide notice at an early date of the time, place and nature of the offense alleged violates due process.

In the present case, as trial counsel suggested, a small form notice delivered to appellant as he left the lineup could have easily been provided. A copy of the lineup sheet might suffice, though it omits the time of offense. 31/ However, in this case there was no notice provided. 32/ Due process is violated by

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30/ Id. at 340, n.2, 323 F.2d at 810, n.2.

31/ The practice of providing counsel with a copy of the lineup sheet had been instituted by the time of hearing on this motion, though not at the time of the lineup in this case (Tr.59).

32/ Notice was finally given after the Grand Jury indictment was returned, some three months after the robbery. The procedure at the lineup, where eleven witnesses viewed the lineup in 16 minutes and counsel was able to get only limited details of each identification, did not amount to notice of the charge. Counsel's failure to tell appellant more than that "they have got you for some other robberies" and "they tried to put some other robberies on you" was due to the uncertainty which results from the sparse information obtainable in the hasty conduct of the lineup. (Tr.34-37, 164-65).

this failure which, far from being merely non-diligent as in Godfrey-Jones, is apparently a calculated prosecutorial policy (Tr.163). This policy has no justification here.

IV

DENIAL OF APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT WAS ERROR, SINCE THERE WAS INADEQUATE EVIDENCE FOR A JURY TO FIND THAT THE ITEM IN THE ROBBER'S HAND WAS A GUN.

The only evidence tending to show that the item the robber used to threaten his victim was a gun is the testimony of the victim.[33/] He said he saw a brown revolver when he was turned around by the robber to be searched, but did not know whether there were any bullets in the chamber (Tr.200). It was not fired during the robbery and the witness estimated he observed the robber for a total of two minutes (Tr.202). The gun was not produced at trial, and no further evidence was offered concerning whether it was, in fact, a gun. No effort was made to negate

33/ Though the victim did not admit it at trial, and was not pressed on the point by counsel, it appears he was so frightened he wet his pants during the robbery (Tr.368-380).

the possibilities that it was an inoperable tool, a toy, a starter pistol, a tear-gas gun, or any number of other non-dangerous non-weapons.

Motions for judgment of acquittal were made on the ground that a jury could not rationally find beyond a reasonable doubt that the item used was in fact a loaded, operable pistol, both at the end of the government's case (Tr.315-321), and after the defense rested (Tr.397). A motion for judgment of acquittal notwithstanding the verdict was also made (Tr.449-450). All were denied.

It is black-letter law in the District of Columbia that

> [A] trial judge in passing on a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. 34/

The three statutes under which appellant was convicted all

34/ Curley v. United States, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232 (1947).

require, as an element of the offenses they prohibit, that the government prove possession of a "dangerous weapon." The Armed Robbery statute is more specific, and includes "any pistol or firearm, or other dangerous or deadly weapon."[35] The ADW statute simply bars "assault with a dangerous weapon,"[36] and the CDW statute prohibits the carrying of "a pistol, without a license therefore issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed."[37]

The indictment in all three counts herein specifies that the weapon in question was a pistol. No argument was made to the jury that it might have been a toy gun, but that that fell within the terms of the statute. Thus, the government's case, taken in its most favorable light, was intended to prove that the item in the robber's hand was an operable pistol.

In Epperson v.United States,[38] a conviction was upheld for

35/ 22 D.C. Code, Section 3202. The full text of this statute is set forth in Appendix A. The full text of 22 D.C. Code, Section 2901, the Robbery statute is set forth in Appendix B.
36/ 22 D.C. Code, Section 502. The full text of the statute is set forth in Appendix C.
37/ 22 D.C. Code, Section 3204. The full text of this statute is set forth in Appendix D.
38/ 125 U.S. App. D.C. 303, 371 F.2d 956 (1967).

carrying a pistol, but the testimony apparently indicated that the pistol contained live amunition and one spent shell.

In Coleman v. United States,[39] the defendant was convicted of possession of a pistol in spite of its suppression as evidence. The court noted that the possession of the gun, though illegally seized, could be and was established at the trial by independent means. The evidence showed defendant had possession of the pistol when it went off and shot another man accidentally. It was clearly a pistol. In Lee v. United States,[40] a conviction was upheld for carrying a pistol without a license. Though it is not entirely clear what the court decides, it appears that since the gun was treated as in evidence, the conviction was upheld. The court additionally said "we find the officer's independent testimony with respect to the possession of a gun, to which no objection was made, sufficient to support a conviction."[41]

The three cases discussed seem to be closest to the issue here presented. None of them decides it. The Lee case may in-

39/ 219 A.2d 496 (D.C.C.A. 1966)

40/ 242 A.2d 212 (D.C.C.A. 1968).

41/ Id. at 214.

dicate that a police officer's characterization of an item he seized and presumably inspected out of caution as a gun is adequate to sustain conviction. That is not this case, since we have neither a police officer nor any handling nor inspection of the item by the frightened robbery victim. It is common knowledge that toy pistols are often used in holdups. Obviously Mr. Jones thought it was an operational and loaded pistol.

Of course, the robber's burden of proof on this issue to his frightened victim who has only another's money in his pocket is considerably less than that required of the government in a criminal prosecution. For this reason, it is submitted that the testimony of Mr. Jones in this case is inadequate for "a reasonable mind to fairly conclude the item was a pistol beyond a reasonable doubt."[42/] Appellant's conviction must therefore be reversed with an order to enter judgment of acquittal on each of the three counts and vacate the sentence herein.

42/ Curley v. United States, 81 U.S. App. D.C. 389, 392, ___, 160 F.2d 229, 232 (1947).

CONCLUSION

For the reasons set forth above, appellant respectfully requests his conviction be reversed and an order issued to enter judgment of acquittal.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,922

UNITED STATES OF AMERICA

Appellee,

vs.

RONALD STEVENSON

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

R. RAYMOND TUOHIG, JR.
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July 17, 1970

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TABLE OF AUTHORITIES*

* This table includes only those authorities herein not listed in the Tables of Authorities in either of the main briefs.

REPLY ARGUMENT

I

Appellant's brief argues that the right to counsel at a lincup requires, at a bare minimum, that descriptions previously given by witnesses be provided counsel. Appellee's response appears to be fourfold: First, the Wade doctrines apply only to Wade.[1/] Second, the attorney can only suggest changes in the lineup due to police control over its structure, and it is the choice of the police alone whether to accept the suggestions. If they decline to do so, they are accepting only the risk that the lineup will later be ruled unnecessarily suggestive. This means, according to appellee, that the courts have no control over the conduct of the lineup. Third, the prior description of an unidentified witness can be put to "'collateral uses'... outside the lineup room." Thus, this appeal must be a ploy to extract "additional discovery at the lineup stage." Fourth, since the lineup here was not unnecessarily suggestive, there was no error.

To appellee's first point, that Wade applies to Wade only, appellant makes only brief reply. The appellee is correct. When the mandate, in Wade was sent to the United States Court of Appeals for the Fifth Circuit, there was only one name thereon.

1/ Appellee's brief at n8.

A reading of that decision alone makes clear the Court had no intention that it be so narrowly construed. So also does a reading of the opinions of the other Justices in the case. Mr. Justice White characterizes the opinion as "propound[ing] a broad constitutional rule" and "far-reaching".[2/] Clearly the rule announced is not limited by the language emphasized in the first two quotations from Wade in Appellee's brief. Rather, that language indicates that Wade represents a class of defendants, and lineups represent a particular class of confrontations.

Appellee's Second argument is more to the point. The line-up is said to be a matter purely in the control of the police. Thus the police and prosecutors assume any and all risks of unnecessary suggestibility. This means not only that counsel has the role only of a witness, but also that the court has no part to play in establishing lineup procedures.

Judicial control of lineups was firmly established in Wade. The court injected an officer of the court into the lineup room itself in that case.[3/] The question presented here is the exact

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2/ United States v. Wade, 388 U.S. 218, 250 (White, J. Dissenting).

3/ The reasons for this decision are clearly delineated in Wade. They include the "grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of recon-

role he is to play. The government obtains judicial orders directing both the defendant and counsel to appear at the prescribed hour for the lineup.[4] Certainly the court has some control over lineup procedures.

Wade did not fully define the extent of the court's role in the lineup area. Rather, by requiring the presence of counsel

> but emphasizing that the requirement depends upon the continued categorization of the lineup as a "critical stage", the court could immediately attack the worst abuses while retaining maximum long-run flexibility.[5]

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3 cont'd/ struction at trial." United States v. Wade, 388 U.S. 218, 237 (1966). "Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness -- 'that's the man.'" Id. at 235-36. Appellee's argument that the government assumes the burden of failure to comply with counsel's suggestions, by reducing counsel's role to that of a witness, would leave the situation largely unaltered. This argument is treated below.

4/ See United States v. Kirby, D.C. Cir. (No. 23,106 decided April 24, 1970), slip op. at 7.

5/ Comment, Lawyers and Lineups, 77 Yale L. Jour. 390, 399 (1967).

Thus, it has been left to the appellate courts to flesh out the meaning of the right to counsel provided in Wade. Definition of the role counsel should play at lineup is likely from the Supreme Court after insights and experience are accumulated and reported by lower courts.

The experience of attorneys whose clients face witnesses in twice-weekly lineups in the District should be heavily relied upon by this court, as well as the urgings of defense counsel elsewhere. For example, the decision of the Legal Aid Agency, noted in Kirby,[6] not to provide substitute counsel on a wholesale basis, and the participation of the Agency in the case of Spriggs v. Wilson[7] should be carefully noted by this court. The defense bar generally agrees with the position appellant here maintains.

The Public Defender of Philadelphia recently risked contempt of court by entirely refusing to participate in all lineups until adequate information was provided to allow effective

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6/ United States v. Kirby, D.C. Cir. No. 23,106, decided April 24, 1970, slip op. at 7.

7/ D.C. Cir. No. 23,548, decided October 16, 1969. A Legal Aid Agency attorney also presented the case of United States v. Allen, 133 U.S. App. D.C. 84, 408 F.2d 1287 (1969) to this court. The issue was raised and is presented in this case by attorneys from

representation.[8] The court held

> that defense counsel has a right to interview prospective identifying witnesses before a lineup begins. This right is a restricted one, however, in order not to unduly delay or impede the lineup. Under adequate rules and regulations, defense counsel will be furnished with a description given by the witness (including circumstances under which the observation was made). He is also entitled to know whether it has been suggested to the witness that the person who committed the crime is in the lineup. Presumably, under carefully drawn and followed rules and regulations, it should not be necessary for defense counsel to conduct an interview. He has the right, nevertheless, to interview the identifying witnesses where the information is not furnished, or where he in good faith believes the information furnished is inadequate.[9]

The role of counsel is not to be merely passive, as the Supreme Court made clear in Wade.[10] Appellant here, unlike the

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7 cont'd/ the Georgetown Legal Internship Program, also representing a sizable number of criminal defendants.

8/ In Re: Defender Association of Philadelphia, XXVIII Legal Aid Briefcase 197 (May, 1970).

9/ Id. at 201.

10/ In rejecting the argument that obstruction would result from the injection of counsel, the court would have defined the passive role of a witness if that were envisioned. Instead the court, quoting from Miranda, spoke of the lawyers' responsibilities in the context of "the good professional judgment he has been taught." Thus, the court said "law enforcement may be assisted by preventing the infiltration of taint in the prosecution's

Philadelphia Defender, seeks only an affirmance of the rule announced in Allen[11/] and Spriggs[12/] by this court, and more recently reiterated in Kirby.[13/] This rule continues to be violated by the Metropolitan Police Department. The language of the Spriggs, Allen and Kirby cases is treated as dicta and entirely disregarded. Prior descriptions are still denied counsel as a matter of policy.[14/] This court should hold clearly that descriptions are to be provided, lest misidentifications continue to occur due to counsel's inability to detect and avoid prejudicial nuances.

10 cont'd/ identification evidence". This preventive function hardly seems passive, and does not coincide with appellee's version of counsel's role. Since the due process argument was available pre-Wade, see e.g. Palmer v. Peyton, 359 F.2d 199 (4 Cir. 1966), appellee's interpretation would also reduce Wade to meaninglessness.

11/ United States v. Allen, 133 U.S. App. D.C. 84, 408 F.2d 1287 (1969).

12/ Spriggs v. Wilson, D.C. Cir. No. 23,548 decided October 16, 1969. Appellee's interpretation of Allen and Spriggs is quite strained.

13/ United States v. Kirby, D.C. Cir. No. 23,106 decided April 24, 1970 slip op. at 6 n.5.

14/ Memorandum Order No.16 on Procedures for Obtaining Pretrial Eyewitness Identification, issued to all members of the Police Department is included as Appendix A to this brief. It restates the policy of providing no prior descriptions at page 5. This policy is one of long standing, and was known to Attorney Murray (Tr. 65). The government's assertion that he did not request the information is a suggestion that such clearly frivolous requests must always be made in spite of the known policy. It is also an effort to again avoid clear resolution of this important issue. As Appellant's brief points out, Mr. Murray was unaware of the fact that the "Adams" order used and meant witnesses to

Appellant must, in addition, take exception to appellee's notion that the risk of prejudice at the lineup is a burden shouldered entirely by the government. Exactly the opposite is true. The defendant who is the victim of a misidentification at a tainted lineup may be able to avoid introduction of the lineup identification itself into evidence. However, the heavy burden of disproving the "independent source" argument, usually accepted by courts,[15] cannot often be shouldered. This means a defendant runs a very high risk that a bad lineup identification will in fact result in an in-court identification and his conviction. The lineup is very crucial for this reason, and conscientious attorneys attempt to blend their clients' inconspicuousness with the others in the lineup. Thus, appellee's "assumption of risk"

14./cont'd/ other crimes would be present, and inquired of the judge signing this order, and the prosecutor, who both seemed likewise not to know. Yet the government now contends that it was obvious, that there would be other witnesses, and that though counsel obtained descriptions from an affidavit in the case to which he was appointed, a request must be made to preserve the issue. Having no effective notice, such a request is not required.

15/ See, e.g., Mendoza-Acosta v. United States, D.C. Cir. No. 21,754 decided June 30, 1970; United States v. Terry, D.C. Cir. No. 22,547 decided January 14, 1970; Long v. United States, D.C. Cir. No. 22,218 decided December 18, 1969; Hawkins v. United States, D.C. Cir. No. 21,997 decided July 9, 1969; Taylor v. United States, D.C. Cir. No. 22,217 decided May 15, 1969.

theory would frustrate these efforts and result in inadequate pressures from the courts and defense counsel to avoid unfairness.

The third position advanced by appellee is a blandishment to protect against "collateral uses" of prior descriptions "outside the lineup room". This is in spite of the fact that such descriptions are provided at trial, and often several days prior thereto. They are often unnecessarily provided in affidavits for arrest warrants which are obtained at presentment. The assertion that the government is "not unmindful" of such "collateral uses" seems to be an accusation of impropriety. After lengthy thought and considerable discussion with colleagues, not a single possibility for such a use occurs to counsel. The lack of such possibilities was noted by this court in Spriggs. Assumedly, this history of sinister uses of information of which the government is "not mindful" will be well documented at oral argument. The discovery provided by prior descriptions is useful to the defense at two points. One is the lineup, where extreme prejudice may be avoided. The other is as impeaching material at trial. Since it is the practice of most prosecutors in the District to provide descriptions several days prior to trial, they are only sought at an earlier time to enable effective representation at the lineup.

The Fourth point of appellee that the lineup was not unnecessarily suggestive is consistent with the government's theory that only suggestibility controls every lineup case. In Gilbert v. California[16] a per se exclusionary rule was adopted which disposes of this contention.[17]

II

Appellee argues that only the suggestiveness of a photographic spread is relevant under Simmons, and that the need for continuing identification justifies the use of photographs. In addition appellee reiterates the argument on the lineup issue that the police have sole discretion to control the pre-trial identification procedure.

The last argument has been met by appellant above, and will not be belabored here. However, appellant again notes that the Wade Court made clear that investigatory procedures that may

16/ 388 U.S. 263, 273 (1967). See also Mason v. United States, 134 U.S. App. D.C. 280, 285 n.23, 414 F.2d 1176, 1181 n.23 (1969).
17/ It seems that appellee here mischaracterizes a harmless error argument. See e.g. Taylor v. United States, D.C. Cir. No. 22,217 decided May 15, 1969, where the standard for viewing the evidence is set forth.

affect the trial by predetermining the issue of identification are within the control of the courts. Indeed, the right of confrontation is relied upon heavily in Wade to justify the result there reached.

This means that the procedures are to be scrutinized, not solely for the suggestiveness in the case before the court, but also for their tendency to prejudice the fact finding process when employed generally. The procedure here attacked is totally unnecessary, and may lead to irreparable harm. Appellant refers the court to the enlightened and scholarly dissent of Judge Winters in United States v. Marson, 408 F.2d 644, 651 (1968).[18/] This opinion stands in lieu of extensive reply to appellee's second argument.

Finally, the need for additional investigation by the police is not demonstrated here. Officer Brady, having witnessed appellant's participation in one robbery, was attempting to close numerous area robberies. Some of these robberies had been open for some time. Though no showing was made of probable cause

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18/ For a good discussion of identification of identification problems, see Comment, Lawyers and Lineups, 77 Yale Law Journal 390 (1967). For the English Rule on the issue here discussed see Id. note 15 at 392.

to believe appellant had committed any of these robberies,[19] Brady was to bring numerous witnesses to open robberies to the already scheduled lineup. This occurred whether or not they identified a photograph. Thus, assumedly, the photographic identification here would have no effect on continuation of the investigation. That issue would be resolved for the police shortly at the already scheduled lineup.

19/ The order is purportedly based upon a dicta Adams v. United States, 130 U.S. App. D.C. 203, 399 F.2d 574 (1968). The propriety of such an order in some circumstances was also recognized in United States v. Allen, 133 U.S. App. D.C. 84, 86, 408 F.2d 1287, 1289 (1969). However, no showing was made to any judicial officer in this case either of probable cause to believe that appellant committed the offenses for which he could be viewed, or that the modus operandi was similar to that in the offense for which he was in custody. Had this been done, not only would appellant and his attorney had the notice deemed necessary in appellant's third argument and the ability to possibly obtain descriptions from witnesses by interviews to satisfy appellant's first contention, but the police would also have known which witnesses to allow to view photographs in connection with this second argument.

III

Appellee misconceives appellant's third argument. It is not suggested by appellant that even one minute of the delay between the identification of appellant at the lineup and the indictment's return was due to any government design to delay notification as long as possible. Certainly no "blame" is assigned for the delay and no charge of consciousness in depriving appellant of due process is levied. Quite the opposite.

It is suggested that the undue fear that the defense will obtain pretrial discovery is the source of the problem exposed by appellant's third issue. The desire to avoid preliminary hearings may be another reason for use of the Grand Jury Original. However, the appellant is the victim of these desires, since, though there is no harm to the government, he is not notified of the offense with which he may be charged for several months.

It is appellant's prison term here at issue, not the government's reasons for failing to notify him. Appellant is ready to assume inadvertence as the cause. However, this policy of inadvertence should be curtailed by the court in order that the accused might have a fair opportunity to honestly reconstruct

his whereabouts.[20]

IV

Appellant does not concede that any of the cases cited by appellee dispose of his fourth point. This is because appellant does not maintain that recovery of and placing the weapon in evidence is an essential to overcoming reasonable doubt. Rather, other means of showing the item in a robber's hand to be a pistol are quite available, as the cases in appellant's brief make clear. Indeed, the introduction of unloaded operable weapons would, as in Gantt and Baker satisfy statutory elements.

However, as appellant is compelled to reiterate:

> the robber's burden of proof on this issue to his frightened victim who has only another's money in his pocket is considerably less than that required of the government in a criminal prosecution.[21]

20/ Appellee's citation of several "narcotics delay cases" is inapposite. The "legitimate reason for delay" in these cases is the maintenance of the usefulness of an undercover agent. Here there was no legitimate reason for delay in notifying appellant, as appellant's brief makes clear, and as counsel continuously urged at trial (Tr. 159-167).

21/ Appellant's Brief at 29.

CONCLUSION

For the reasons above, appellee respectfully requests reversal with an order of judgment of acquittal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. Raymond Twohig, Jr., hereby certify that a copy of the foregoing brief was personally served upon the office of the United States Attorney, this 17th day of July, 1970.

R. Raymond Twohig, Jr.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Metropolitan Police Department

May 15, 1970

MEMORANDUM ORDER NO. 16
Series 1970

SUBJECT: Procedures for Obtaining Pretrial Eyewitness Identification

TO THE FORCE:

Continuing changes in the law suggest the need to establish procedures for (1) on-the-scene identifications of suspects by ~~victims~~ and eyewitnesses to a crime, (2) the use of photographs for identification purposes, and (3) court-ordered lineups. The following procedures are designed both to promote the reliability of eyewitness identifications by eliminating suggestive behavior, and, more generally, to increase effectiveness in bringing investigations to a successful conclusion.

I. RETURN OF SUSPECT TO THE SCENE OF THE CRIME FOR IDENTIFICATION

1. If a suspect is arrested within 60 minutes of an alleged offense and within an area reasonably proximate to the scene of the crime, he shall be returned to the scene of the offense, or the eyewitnesses shall be transported to the scene of the arrest, for identification of the suspect.

2. Even if the suspect has a weapon or tools similar to that used in the commission of the alleged offense, or has proceeds similar to that taken in the alleged offense, police officers shall return the suspect to the scene for identification purposes.

For example: There is a look-out for a robbery-holdup that has just occurred. One suspect was armed with a chrome-plated .22 caliber pistol. Twenty minutes later and five blocks from the scene an arrest is made of the holdup man who is found to be armed with a chrome-plated .22 caliber pistol. He shall be returned to the scene of the holdup, or the witnesses shall be transported to the scene of the arrest, for identification of the suspect.

3. When a suspect thought to have been injured while perpetrating a crime appears at a hospital or other place for treatment within 60 minutes of the offense, the eyewitnesses shall be taken to the hospital to make an identification. If an injured suspect appears

APPENDIX A

for treatment later than 60 minutes after the offense, and is not in "critical" condition, the eyewitnesses shall not be permitted to view the suspect, but may view the suspect's photograph as provided in Part II of this Order. If a suspect is admitted to a hospital in "critical" condition later than 60 minutes after the offense, eyewitnesses may be taken to the hospital to make an identification.

In those cases where the victim of an assault is admitted to the hospital in "critical" condition, a suspect later arrested may be taken to the hospital for identification by the victim regardless of the time lapse between the offense and the arrest.

For example: The victim of a robbery has been shot and is not expected to live. An arrest is made two hours later several miles from the scene of the shooting. The suspect may be taken to the bedside of the victim for identification if the victim is still in critical condition since the victim may die before a court-ordered lineup could be arranged.

4. Regardless of the time of arrest there shall be no identifications or lineups conducted at police facilities without the specific authorization of the United States Attorney's Office.

For example: Officers investigating a Burglary I have broadcast a look-out and have requested the complainant to accompany them to the District station to view photographs of suspects suspected of other burglaries in the neighborhood. While at the station an arrest is made by another unit one-half hour after the offense was committed, and only three blocks from the scene. There should be no identifications made at the station. The complainant should be driven either to the scene of the arrest or to the scene of the burglary to make an identification.

5. When presenting a suspect to the eyewitness for identification, police officers shall remain as neutral as possible consistent with their maintenance of custody and control over the suspect.

6. Police officers shall neither say nor do anything which will convey to the witness that the suspect has admitted his guilt, that property similar to that stolen has been recovered, that weapons similar to those used have been seized, or that the officer believes the suspect is guilty.

For example: Do not tell the witness, "He's given us a full confession but we still want your identification." Do not display the proceeds of the crime by holding up the stolen wallet and saying, "He had your wallet but we haven't found your pocketbook yet."

7. It is extremely important that the officer make written notes of any statements made by each witness viewing the suspect. In presenting a suspect to a victim or eyewitness, police officers shall be alert for spontaneous exclamations or excited utterances or other reactions by the witness since an officer can testify to these events in court and such testimony may enhance a subsequent in-court identification. These statements should be incorporated in the statement of facts of the case.

For example: Upon viewing the suspect, the victim of a rape exclaims, "That's him! See the scar on his neck." This statement should be recorded verbatim on the statement of facts.

8. When a suspect is returned to the scene of a crime for identification, or when eyewitnesses are taken to the scene of the arrest, all witnesses shall view the suspect. To the extent practicable each witness shall view the suspect independently, out of the immediate presence of the other witnesses.

For example: There has been a holdup of a liquor store and the suspect was arrested a short distance away. When the suspect is transported back to the scene he should not be taken into the store area where the witnesses are gathered. Instead, each witness should be taken separately to the front of the store where the suspect is standing.

9. This Order does not bar the accepted police procedure of transporting victims and eyewitnesses in police vehicles and cruising an area in which a crime has occurred in order to point out the perpetrator of the offense.

10. When an arrest is made of a subject which is based in part on the description of distinctive clothing, the arresting officer shall request the Identification Branch, Central Records Division, to take a color photograph of the prisoner. Transporting officers shall be alert to the possibility of prisoners exchanging clothing with others prisoners or discarding clothing prior to their being photographed at the Identification Branch. In appropriate cases such clothing may also be seized as evidence in the case.

11. Before any suspect is released for lack of witness identification, the circumstances of the incident, including the person's name and address, shall be recorded on the PD 725, to provide an official record for the Department.

II. USE OF PHOTOGRAPHS FOR IDENTIFICATION PURPOSES

1. The use of photographs for identification purposes prior to an arrest is permissible provided the suspect's photograph is grouped with at least eight (8) other photographs of the same general description.

2. Adequate records of the photographs shown to each witness must be kept so that the exact group of photographs from which an identification was made can be presented in court at a later date to counter any claim of undue suggestion and enhance the reliability of the in-court identification. This information shall be recorded in the statement of facts of the case.

3. Each witness shall view the photographs independently, out of the immediate presence of the other witnesses.

4. When an arrest is made following a photographic identification, the officer handling the case in court shall request an Assistant United States Attorney to obtain a court order to require the defendant to appear in a lineup.

III. COURT-ORDERED LINEUPS

1. If there are eyewitnesses who have not viewed a suspect at the scene or have not viewed a group of photographs, the officer handling the case in court shall, on his first appearance in court, request an Assistant United States Attorney to obtain a court order for the suspect's appearance at a scheduled lineup.

2. When a suspect arrested in one case is thought to be responsible for other unsolved crimes of a similar nature and involving the same modus operandi, the officer handling the unsolved criminal case shall request an Assistant United States Attorney to obtain a court order to require this suspect to stand in a lineup to be viewed by witnesses in these unsolved criminal cases. The officer shall not permit the witnesses to the unsolved case to attempt to make an identification by attending the suspect's arraignment or preliminary hearing in court.

3. The officer handling the case shall execute a summons for each witness who will attend the lineup. The officer shall note on the summons his own name, the type of offense, the location of the offense, the date of the offense, the date of the lineup, and the location of the lineup. The witnesses shall be directed to bring the summons with them when attending the lineup. On the date of the lineup, the officer handling the case in court shall contact the Detective Sergeant in the Robbery Branch who is conducting the lineup and provide him with all requested information concerning the case, including the names of witnesses who will appear and the names of the suspects which the witnesses are to view.

4. Court-ordered lineups will be held in the Criminal Investigations Division Roll-Call Room on the third floor of Police Headquarters. The United States Attorney's Office shall be responsible for notifying the defendant, defense counsel, and for having an Assistant United States Attorney present. The officer handling the

case in court shall be present and shall be responsible for having the witnesses present for all court-ordered lineups.

5. Lineups for adult Negro males are held every Tuesday and Thursday evening. The officer handling the case in court shall report to the Robbery Branch by 1830 hours. This is to permit the Detective Sergeant conducting the lineup to learn who is handling the case and give the officer opportunity to check in his witnesses as they appear and give them instructions. All witnesses shall be directed by summons to report to the Robbery Branch by 1900 hours.

In those cases where a lineup is appropriate for a juvenile, the officer handling the case in court shall contact the Corporation Counsel's Office, Juvenile Court, for an appropriate time and date. He shall also contact the Youth Division to arrange to have a member of that unit present during the lineup.

Lineups for all others shall be specially scheduled through the Robbery Branch. The officer handling the case in court shall contact the Robbery Branch to establish a date and time for such a lineup. The witness' summons shall reflect the time and date agreed upon.

6. Counsel for a suspect appearing in a lineup shall be given the date, time, place and nature of the offense prior to the beginning of the lineup by the Detective Sergeant of the Robbery Branch. Counsel for a suspect appearing in a lineup will not be given the names of the witnesses who will view the lineup in the case involving his client, nor will any prior description of the suspect given to the police be made available to him by police officers.

7. Witnesses shall view the lineup one at a time. If more than one witness to a particular crime is present, each shall view the lineup separately and independently. Witnesses should not converse or otherwise communicate with other witnesses after having viewed the lineup until the last witness in the case has viewed the lineup.

Jerry V. Wilson
Chief of Police

JVW:EJC:cjg

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA	:	
	:	
	:	
v.	:	No. 23,922
	:	
	:	
RONALD STEVENSON	:	

APPELLANT'S PETITION FOR REHEARING ~~IN BANC~~
And Suggestion for Rehearing in Banc

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 16 1970

Nathan J. Paulson
CLERK

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(Appointed by this Court)

On December 2, 1970, a panel of this Court affirmed appellant's conviction for armed robbery, assault with a dangerous weapon and carrying a dangerous weapon. He is presently serving a sentence at the Lorton Youth Center concurrent to a sentence for other robberies. Three issues of great importance in District criminal procedure were decided adversely to appellant:

I

DOES EFFECTIVE ASSISTANCE OF COUNSEL AT A LINEUP REQUIRE THE GOVERNMENT TO PROVIDE TO COUNSEL THE NAMES OF WITNESSES, PRIOR DESCRIPTIONS GIVEN BY WITNESSES, AND TIME, PLACE AND NATURE OF THE CRIMES INVOLVED.

The panel held there is no duty to

> volunteer the information as to the description given the complaining witness at the service station robbery. Appellant's counsel did not request such information and it does not appear that the absence of such information in any way prejudiced the appellant. slip op. at 3.

Appellant's lineup was held about two weeks after this Court suggested, in Allen v. United States, 133 U.S. App. D.C. 84, 408 F.2d 1287 (1969) the effective assistance of counsel would require provisions

> in advance of the lineup the names of the witnesses who would attend; the time, place and nature of the crimes involved; and the descrip-

> tions of the suspect, if any, which the witnesses had given to the police.

Such information was not provided attorneys at the time of the lineup in the instant case, nor is it provided at the present time, whether requested or not. Counsel in the present case didn't request it, because he knew such requests were useless (Tr.64-65). Spriggs v. Wilson, _____ U.S. App. D.C. ____, 419 F.2d 759 (1969) and United States v. Kirby, No. 23,106, dec. Apr. 24, 1970, also point out these requirements of the right to counsel.

Appellant was not notified he would be charged with this robbery until nearly two months after the lineup, when he was indicted. His inability to reconstruct the day in question was due to that delay. Compliance with Allen - Spriggs - Kirby would have provided adequate notice. Failure to do so was prejudicial.

In practice, the government disregards the three cited cases as dicta. The court should rehear this case in banc in order to define effective assistance of counsel at a lineup in light of experience since the Wade - Gilbert - Stovall decisions of 1967. The panel decision herein is being taken to require a specific request for information along with a defense showing of prejudice before compliance with Allen - Spriggs - Kirby is required. Such a showing is impossible.

II

DOES A POST-ARREST DISPLAY OF PHOTOGRAPHS TO WITNESSES WHO ARE TO ATTEND A SCHEDULED LINE-UP DENY EFFECTIVE ASSISTANCE OF COUNSEL OR CREATE AN UNNECESSARY RISK OF MISIDENTIFICATION?

The panel held the showing of photos here "carries no hint of suggestivity", slip opinion at 4, and that

> there is nothing wrong per se in the police securing a photographic identification before calling the witness to a lineup at which the suspect appears.

In Clemons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968), this Court, sitting en banc, said:

> Apart from photographic leads and the familiar post-arrest police station confrontation, there are possible variations in the circumstances of arrest and detention where the right to counsel, as well as the demands of due process, will have to be defined and measured from case to case by reference to the reasonableness of the police conduct under the particular circumstances. Id. at 34-35, 408 F.2d at 1238.

The incursion of a post-arrest photographic showing made without reason upon the right to counsel at the impending lineup was unreasonable here. No investigative justification exists for the risk of a misidentification which could permanently plant an image of an accused. Counsel's ability to participate in the lineup's construction and conduct was the victim of a prior identification

which is unjustifiable.

This Court should take the opportunity to clarify en banc for the first time since Clemons what protection of the right to counsel at lineup requires of the police after an arrest has been made.

III

DOES A THREE MONTH DELAY IN PROVIDING AN IN CUSTODY ACCUSED WITH NOTICE THAT HE IS TO BE CHARGED WITH A SECOND AND SEPARATE OFFENSE VIOLATE DUE PROCESS WHERE PREJUDICE IS SHOWN?

The panel held there was "no prejudicial delay in the two and a half month delay between the date of offense and the indictment."

In Nickens v. United States, 116 U.S. App. D.C. 338, 323 F.2d 808 (1963), this Court condemned the delay of notice of the offense to be charged

> for an unreasonably oppressive and unjustifiable time after the offense to the prejudice of the accused. Id. at 340 n.2, 323 F.2d at 810 n.2.

From that concept grew the cases of Ross v. United States, 121 U.S. App. D.C. 233, 238 F.2d 259 (1956); Godfrey v. United States, 123 U.S. App. D.C. 219, 358 F.2d 850 (1966); and Jones v. United States, 131 U.S. App. D.C. 88, 402 F.2d 639 (1968). The government in those cases offered unacceptable justifications for failure to arrest those to be charged. Other cases condemn delays in indictment returns and information filing. Many of the delays condemned are justified by reference to administrative burden.

However, no justification can be offered for failing to dis-

close to a person in custody on one offense that he will also be charged with another one which occurred at another time and place. Yet Appellant was not notified for several months.

The solution calls for form notice or pre-lineup provision of the information sought in part I. The injury to future defendants will be great unless this Court utilizes this case as a vehicle to resolve the questions.

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CONCLUSION

Rehearing *in banc* upon the three enumerated issues will clarify important and uncertain issues. The fourth issue raised on appeal is abandoned in an effort to obtain full review of these three issues. The first and third issues invite solution by provision of certain information to counsel pre-lineup. The first and second issues intertwine in such a way that the substance of the right to counsel at lineups can be fully explored. Rehearing on all three issues is therefore requested *in banc*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for Rehearing In Banc has been personally served upon the Office of the United States Attorney, Appellate Division, United States District Court, Washington, D.C., this 16th day of December, 1970.

R. RAYMOND TOHIG, JR.